

No. 76-450

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

INGRAM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 541 F.2d 166.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1976. The petition for a writ of certiorari was filed on September 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner's challenge to an order of the district court authorizing the disclosure of grand jury materials to federal law enforcement agents was premature.

RULE INVOLVED

Rule 6(e), Fed. R. Crim. P., provides in part:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

STATEMENT

A grand jury of the United States District Court for the Northern District of Illinois was empaneled in March 1974 to investigate, among other matters, a contract between the Metropolitan Sanitary Dis-

trict of Greater Chicago and Ingram Barge, Inc., a subsidiary of petitioner Ingram Corporation. In June 1974, the United States Attorney obtained an order from the district court, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, authorizing disclosure of records subpoenaed and transcripts of testimony heard by the grand jury to agents of the Internal Revenue Service, the Federal Bureau of Investigation and the Postal Inspection Service in order to assist in determining "whether there have been civil or criminal violations of Titles 18 and 26, United States Code" (Pet. App. 12a).

In the course of the grand jury investigation, petitioner's records were subpoenaed and several of its officers were called to testify. In late 1975, petitioner learned of the disclosure order and objected to it on the ground that it permitted use of grand jury materials in connection with civil investigations. It requested that an evidentiary hearing be held to ascertain the scope of the allegedly improper disclosure and sought a ruling that all improperly disclosed evidence was inadmissible in any subsequent civil proceeding. The district court modified the June 14, 1974, order to omit the reference to civil proceedings (Pet. App. 12a), but it otherwise denied the relief requested (Pet. App. 3a).

Petitioner thereafter renewed its motion for an evidentiary hearing and submitted affidavits alleging that the I.R.S. was continuing to have access to grand jury materials in connection with its civil tax investigation of petitioner. In response, the two

Assistant United States Attorneys in charge of the grand jury investigation filed affidavits in which they stated that the only purpose of the grand jury inquiry was to determine whether criminal violations had occurred and that disclosures had been made pursuant to the June 1974 court order for the sole purpose of assisting the grand jury in making that determination (Pet. App. 3a-4a). The district court denied the motion, concluding that an evidentiary hearing, which would "interfere with the Grand Jury in the continued performance of its proper functions," was unnecessary "because petitioner has failed to sustain its burden of establishing on a threshold level a purposeful violation of [Fed. R. Crim. P.] 6(e) or a non-speculative injury" (C.A. App. 57, 58).¹

Petitioner appealed the district court's order and also sought a writ of mandamus. The court of appeals dismissed the appeal on the ground that the district court's denial of relief was not a final order (Pet. App. 4a-10a). The court also denied the petition for a writ of mandamus to prevent "disruption of the judicial process by a device of another make" (Pet. App. 11a). While the case was pending in the court of appeals, the grand jury indicted several officers of petitioner for crimes related to an alleged multi-million dollar bribery-fraud scheme (Pet. App. 4a). The Special March 1974 Grand Jury was discharged on August 18, 1976.

¹ "C.A. App." refers to the appendix in the court of appeals.

ARGUMENT

To the extent that petitioner challenges those provisions of the district court's order of February 20, 1976, that continue the authorization of disclosure of the materials of the Special March 1974 Grand Jury to federal government personnel, the expiration of that grand jury in August 1976 has mooted the issue.² Moreover, as the court of appeals correctly determined, petitioner's allegations of injury and claims for relief on account of any past disclosures that may have occurred are speculative and premature at this time. In any event, the argument that agents of the Internal Revenue Service, the Federal Bureau of Investigation, or the Postal Inspection Service may not be given access to grand jury materials for the sole purpose of rendering assistance to the grand jury in its criminal investigations has repeatedly been rejected by the lower courts. Especially where, as here, a court order authorizing such disclosure was obtained, any claim of impropriety is insubstantial.

1. Petitioner's grievance in the district court was two-fold: petitioner contended that the materials it

² We note in addition that it is unsettled whether Rule 6(e) of the Federal Rules of Criminal Procedure even applies to documents subpoenaed for use by a grand jury. See *United States v. Weinstein*, 511 F. 2d 622, 627, n. 5 (C.A. 2), certiorari denied *sub nom. Austin v. United States*, 422 U.S. 1042; *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (C.A. 2); 1 Wright, *Federal Practice and Procedure* § 106, p. 172 and n. 97 (1969).

supplied to the grand jury under subpoena had been improperly disclosed to federal agents under the original district court order for use in connection with possible civil as well as criminal proceedings; it also claimed that the continued disclosure of these materials to the agents under the amended order for the limited purpose of assisting the grand jury in its criminal investigation, even though judicially authorized, violated Fed. R. Crim. P. 6(e). It demanded an evidentiary hearing to determine the nature and extent of the prior, allegedly improper, use of the materials and an order enjoining any future disclosures. Neither claim is presently ripe for judicial review.

First, petitioner's request for relief to prevent future disclosures of grand jury materials under the district court's order is moot, since the grand jury has now expired. In any event, as to the use of the materials in connection with possible civil proceedings, which was the crux of its complaint, petitioner's claims are wholly illusory. Not only did the district court grant petitioner full prospective relief by amending its order on February 20, 1976, to eliminate any authorization of that practice, but also "the two Assistant United States Attorneys in charge of the grand jury investigation filed affidavits with the court asserting unequivocally that the only purpose of the grand jury inquiry was to determine whether there had been criminal violations and that disclosure had only been made to agents of the government

in order to assist in making that determination" (Pet. App. 3a-4a).

As for any injury to petitioner because of improper disclosures that may previously have occurred under the district court's order, its grievance is entirely speculative at this time and may possibly prove to be non-existent. Although petitioner fears that these disclosures may lead to civil or criminal proceedings, no such proceedings have yet been instituted against it and none may ever be filed. Any relief to which petitioner might now be entitled could as readily be afforded in the event that civil or criminal charges are brought, and petitioner would then have the advantage of having its claims considered in a more concrete setting.³ Thus, as Judge Friendly has written in a closely related context, petitioner has not

³ Contrary to petitioner's contention, *United States v. Universal Mfg. Co.*, 525 F. 2d 808 (C.A. 8), does not hold that an evidentiary hearing may be appropriate, *after* a disclosure of grand jury materials has been made to government personnel, "to determine the extent of the improper disclosures and to cure the effects of those disclosures" (Pet. 9). Rather, the court of appeals there concluded that in some cases a hearing may be necessary, *in advance* of any disclosures, to determine whether there is a need for certain government agents to have access to the materials. Obviously, the hearing envisioned by the Eighth Circuit would focus solely upon the grand jury's need for expert assistance; unlike the hearing sought by petitioner, it would not involve an inquiry into what use may have been made or what leads may have been derived from specific pieces of evidence that were supplied to the grand jury. Indeed, the hearing contemplated by petitioner would be especially inappropriate in view of the pending criminal charges against several of its officers.

been deprived of its legal right to challenge the district court's disclosure order, but it must "be satisfied for the time being with the determination of the district judge." *In re Grand Jury Investigation of Violations of 18 U.S.C. § 1621 (Perjury)*, 318 F. 2d 533, 538 (C.A. 2), certiorari dismissed, 375 U.S. 802.⁴

Although petitioner contends (Pet. 5, n. 1) that the decision below conflicts with those of other circuits, the court of appeals correctly observed that those decisions "reached the merits of interlocutory problems involving the grand jury with little or no discussion of jurisdiction" (Pet. App. 8a). In addi-

⁴ Petitioner asserts (Pet. 6) that future relief may be inadequate because the materials may be admissible in subsequent civil proceedings even if they had been improperly disclosed to government personnel. The cases on which petitioner relies do not support that proposition. But if petitioner is correct that it would not be entitled to suppression in future litigation, there is by that token no reason to make that remedy available to it now. Similarly, although petitioner fears that its "right to privacy" may have been infringed by the allegedly unauthorized transmittal of grand jury information to agents of the F.B.I., I.R.S., or Postal Inspection Service, any such harm has already occurred. It should be noted, however, that the federal agents who were given access to the materials are subject to the continuing jurisdiction of the district court and are bound by the requirements of grand jury secrecy. Future breaches of that secrecy obligation may be punished as contempt. See, e.g., *United States v. Dunham Concrete Products, Inc.*, 475 F. 2d 1241, 1249 (C.A. 5), certiorari denied, 414 U.S. 832; *United States v. Hoffa*, 349 F. 2d 20, 43 (C.A. 6), affirmed, 385 U.S. 293; *United States v. United States District Court*, 238 F. 2d 713, 721 (C.A. 4), certiorari denied *sub nom.* *Valley Bell Dairy Co. v. United States*, 352 U.S. 981.

tion, unlike the circumstances here, many of these cases dealt with situations in which the disallowance of an immediate appeal would effectively have precluded meaningful review at any time. Thus, several decisions cited by petitioner involved the release of grand jury materials either to the public (*In re Biaggi*, 478 F. 2d 489 (C.A. 2)) or to state judicial or administrative bodies (see, e.g., *In re Special February 1971 Grand Jury*, 490 F. 2d 894 (C.A. 7); *In re Holovachka*, 317 F. 2d 834 (C.A. 7); *Doe v. Rosenberg*, 255 F. 2d 118 (C.A. 2)). Since the recipients of the secret information in those cases were not subject to the supervision of the federal courts, unless immediate appellate review were available "the practical effect of the [disclosure] order [would] be irreparable by any subsequent appeal" (*DiBella v. United States*, 369 U.S. 121, 126) and the aggrieved party would have been "powerless to avert the mischief of the order" (*Perlman v. United States*, 247 U.S. 7, 13). Moreover, in such cases there was little danger that an appeal would have disrupted the work of the grand jury, as there is when the purpose of the challenged disclosure is to provide expert assistance to the grand jury's investigation (see *Cobbledick v. United States*, 309 U.S. 323, 327-328), nor would determination of the claim in such cases have required an inquiry into and disclosure of the details of the grand jury's activities, such as petitioner here seeks. Furthermore, other decisions on which petitioner relies involved the denial of a disclosure application (see, e.g., *In re Grand*

Jury Proceedings, 309 F. 2d 440 (C.A. 3)), an order that obviously must be reviewed at once if complete relief is to be afforded.⁵

2. In any event, petitioner's challenge to the validity of the February 20, 1976, order of the district court is insubstantial. That order authorized disclosure of the materials of the Special March 1974 Grand Jury to agents of the I.R.S., the Postal Inspection Service, and the F.B.I., "acting under the supervision of the United States Attorney of the Northern District of Illinois," for the limited purpose of "aid[ing] said grand jury in determining whether there have been criminal violations of the

⁵ A panel of the Ninth Circuit has recently held that an order denying relief against an allegedly improper disclosure of grand jury materials to federal personnel was appealable. *In re Grand Jury (J. R. Simplot Co.)*, Nos. 76-1893 and 76-1995, decided November 12, 1976. Although we believe that *Simplot* was incorrectly decided, we note that that case was concerned with the problem of affording effective relief against ongoing, allegedly unauthorized disclosures, which is not the situation here. In addition, the court did not purport to announce a rule allowing an immediate appeal of every order authorizing a grand jury disclosure, and it expressly distinguished the instant case on several grounds. See slip op. 5 and n. 4. Moreover, the opinion in *Simplot* is hard to square with other recent decisions of the Ninth Circuit, which have held that objections to the use of grand jury materials by the I.R.S. should be raised in a subsequent civil tax liability proceeding. See *Matter of Fred R. Witte Center Glass No. 3*, 544 F. 2d 1026, 1029 (C.A. 9); *Coson v. United States*, 533 F. 2d 1119, 1121 (C.A. 9); cf. *Meier v. Keller*, 521 F. 2d 548 (C.A. 9), certiorari denied, 424 U.S. 943. The government has moved for rehearing, with suggestion of rehearing *en banc*, in *Simplot* to resolve these apparent intra-circuit conflicts, and that petition is presently pending.

United States Code" (Pet. App. 12a).⁶ Utilization of the services of expert government personnel to assist the grand jury in its inquiries has repeatedly been recognized by the courts of appeals to be not only legitimate, but also advisable, when dealing with allegations involving complex and sophisticated corporate or financial crimes such as those involved here. Such use of ancillary personnel has therefore been sustained even in the absence of express judicial authorization. See, e.g., *Coson v. United States*, 533 F. 2d 1119, 1120-1121 (C.A. 9); *United States v. Evans*, 526 F. 2d 701, 707 (C.A. 5), certiorari denied, No. 75-1487, October 4, 1976; *United States v. Dunham Concrete Products, Inc.*, 475 F. 2d 1241, 1249 (C.A. 5), certiorari denied, 414 U.S. 832; *United States v. Hoffa*, 349 F. 2d 20, 43 (C.A. 6), affirmed, 385 U.S. 293; *In re April 1956 Term Grand Jury*, 239 F. 2d 263, 272-273 (C.A. 7); *United States v. United States District Court*, 238 F. 2d 713, 721 (C.A. 4), certiorari denied *sub nom. Valley Bell Dairy Co. v. United States*, 352 U.S. 981. See also *In re July 1973 Grand Jury*, 374 F. Supp. 1334, 1335 and n. 2 (N.D. Ill.); *In re William H. Pflaumer & Sons*, 53 F.R.D. 464, 473-477 (E.D. Pa.). *A fortiori*, there is no violation of Rule 6(e) if the disclosure occurs pursuant to court order. See *United States v. Universal Mfg. Co.*, 525 F. 2d 808, 812 (C.A. 8). Rule 6(e) does not prohibit or restrict the limited release of materials when the release is exclusively for the bene-

⁶ Petitioner's description of the court's order (Pet. 8-9) is inaccurate.

fit of the grand jury, in connection with its ongoing judicial proceeding, rather than for the benefit of the recipients of the information.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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